

**CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON**

MASTER BUILDERS ASSOCIATION OF)	
PIERCE COUNTY, TERRY L. BRINK,)	CPSGMHB Case No. 02-3-0010
EDWARD ZENKER, ASSOCIATED)	
GENERAL CONTRACTORS and)	(MBA/Brink)
TACOMP-PIERCE COUNTY CHAMBER)	
OF COMMERCE – SOUTH COUNTY)	
DIVISION,)	
)	
Petitioners,)	
)	
v.)	
)	SECOND COMPLIANCE
PIERCE COUNTY,)	ORDER – FINDING
)	COMPLIANCE and
Respondent.)	RESCINDING INVALIDITY
)	

I. BACKGROUND

On February 4, 2003, the Central Puget Sound Growth Management Hearings Board (the **Board**) issued its Final Decision and Order (**FDO**) in the above captioned case. The Board found portions of the Parkland Spanaway Midland Community Plan (**PSMCP**) and implementing development regulations (**IDRs**) noncompliant with the Act and issued a determination of invalidity for these noncompliant provisions of the PSMCP and implementing regulations. The FDO provided in relevant part:

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, having considered the arguments of the parties, and having deliberated on the matter the Board **ORDERS**:

Pierce County's enactment of Ordinance No. 2002-21s, adopting the Parkland Spanaway Midland Community Plan (**PSMCP**) was **clearly erroneous** with respect to the following provisions:

- The adoption of the High Density Single Family (**HSF**) zone provisions, as an amendment to the PSMCP, at the June 11, 2002 hearing, **does not comply** with the notice and public participation requirements of RCW 36.70A.035, .130(2) and .140; and

- PSMCP Standard 24.4.2, regarding the locational criteria for applying the Single Family (SF) zone **is not guided by** and **does not comply** with RCW 36.70A.020(1) and (2).

Pierce County's enactment of Ordinance No. 2002-22s, adopting the PSMCP implementing, or zoning regulations was **clearly erroneous** with respect to the following provisions:

- The Residential Resource (RR) zoning designations for Area 1 (Midland/North Fork Origin), Area 3 (North Fork Tributary), Area 4 (Historic Clover Creek Channel RR), Area 7 in its entirety (Military Road East RR), and Area 8 (14th Avenue East RR) are not appropriate urban densities and are **not guided by**, and **do not comply** with RCW 36.70A.020(1) and (2); and
- The Single Family (SF) zoning designation is not an appropriate urban density and is **not guided by**, and **does not comply** with RCW 36.70A.020(1) and (2).

In addition to finding these provisions of Ordinance Nos. 2002-21s and 2002-22s noncompliant with the noted goals and requirements of the Act, the Board has concluded these provisions substantially interfere with the fulfillment of goals 1, 2 and 11 of the GMA and enters a **determination of invalidity** for these noncompliant provisions of the PSMCP and implementing development regulations.

The Board **remands** Ordinance Nos. 2002-21s (the PSMCP) and 2002-22s (the IDRs – zoning regulations) to the County with the following directions:

1. By no later than **August 1, 2003**, the County shall take appropriate legislative action to bring the Parkland Spanaway Midland Community Plan and zoning regulations into compliance with the goals and requirements of the GMA, as interpreted and set forth in this Final Decision and Order (**FDO**).
2. By no later than **August 8, 2003**, the County shall file with the Board an original and four copies of a Statement of Action Taken to Comply (**SATC**) with the GMA, as interpreted and set forth in this FDO. The SATC shall attach copies of legislation enacted in order to comply. The County shall simultaneously serve a copy of the SATC, with attachments, on Petitioners.
3. By no later than **August 21, 2003**, the Petitioners may file with the Board an original and four copies of Comments on the County's

SATC. Petitioners shall simultaneously serve copies of their Comments on the County's SATC on the County.

4. By no later than **September 4, 2003**, the County may file with the Board an original and four copies of the County's Reply to Comments. The County shall simultaneously serve a copy of such Reply on Petitioners.

Pursuant to RCW 36.70A.330(1), the Board hereby schedules the **Compliance Hearing** in this matter for **10:00 a.m. September 8, 2003** at the Board's offices. With the consent of the parties, the compliance hearing may be conducted telephonically.

If the County takes legislative compliance actions prior to the August 1, 2003 deadline set forth in section 1 of this Order, it may file a motion with the Board requesting an adjustment to this compliance schedule.

FDO, at 33-35.

Pursuant to a request of the parties, on July 25, 2003, the Board issued an Order rescheduling the compliance hearing for August 18, 2003.

On August 18, 2003, the Board conducted the compliance hearing. Present for the Board were Board Members Edward G. McGuire, Presiding Officer, and Joseph W. Tovar. Petitioners MBA/Brink was represented by G. Richard Hill and Courtney A. Kaylor. Lloyd P. Fetterly represented Pierce County. Lynette Meachum (Board Extern), Tiffany Spier (MBA) and Hugh Taylor (Pierce County) also attended the hearing.

Following some post-hearing briefing, the Board issued its "Order Finding Partial Noncompliance and Continuing Invalidity" (**9/4/03 Order**) on September 4, 2003.

The 9/4/03 Order found that the County's compliance actions **complied** with the GMA, **except** for the following:

Based upon review of the FDO, the SATC, Ordinance No. 2003-49s, the pre and post hearing briefing and exhibits submitted by the parties, having considered the arguments of the parties, and having deliberated on the matter the Board ORDERS:

Pierce County's enactment of Ordinance No. 2003-49s, amending the Parkland Spanaway Midland Community Plan and implementing regulations, was **clearly erroneous** with respect to the following provision:

- The two areas totaling 127 acres of Residential Resource (RR) zoning designations within Area 1 (Midland/North Fork Origin) are not appropriate urban densities and are **not guided by**, and **do not comply** with, RCW 36.70A.020(1) and (2).

In addition to finding this provision of Ordinance Nos. 2003-49s noncompliant with Goals 1 and 2 of the Act, the Board has concluded this provision continues to substantially interfere with the fulfillment of Goals 1 and 2 of the GMA and enters a **Continuing Determination of Invalidity** for this noncompliant provision of the PSMCP implementing development regulations.

The Board **remands** Ordinance No. 2003-49s to the County with the following directions:

1. By no later than **December 9, 2003**, the County shall take appropriate legislative action to bring the Parkland Spanaway Midland Community zoning regulations (RR zone), as applied to 127 acres in Area 1, into compliance with the goals and requirements of the GMA, as interpreted and set forth in the February 4, 2003 FDO and this Order.
2. By no later than **December 16, 2003**, the County shall file with the Board an original and four copies of a Statement of Action Taken to Comply (**SATC**) with the GMA, as interpreted and set forth in the FDO and this Order. The SATC shall attach copies of legislation enacted in order to comply. The County shall simultaneously serve a copy of the SATC, with attachments, on Petitioners.
3. By no later than **January 5, 2004**, the Petitioners may file with the Board an original and four copies of Comments on the County's SATC. Petitioners shall simultaneously serve copies of their Comments on the County's SATC on the County.
4. By no later than **January 8, 2004**, the County may file with the Board an original and four copies of the County's Reply to Comments. The County shall simultaneously serve a copy of such Reply on Petitioners.

Pursuant to RCW 36.70A.330(1), the Board hereby schedules the **Second Compliance Hearing** in this matter for **10:00 a.m.**

January 15, 2004, at the Board's offices. With the consent of the parties, the compliance hearing may be conducted telephonically.

If the County takes legislative compliance actions prior to the December 9, 2003 deadline set forth in section 1 of this Order, it may file a motion with the Board requesting an adjustment to this compliance schedule.

9/4/03 Order, at 13-14.

On December 15, 2003, the Board received Pierce County's "Supplemental Statement of Actions to Comply" (**SATC2**). The SATC2 indicated that on November 4, 2003 the County enacted Ordinance No. 2003-101 to comply with the GMA and Board's 9/4/03 Order.

The Board did not receive any comments from Petitioners regarding the County's SATC2.

On January 9, 2004, the Board notified the parties that the January 15, 2003 Compliance Hearing would be conducted telephonically.

On January 13, 2004, the Board received a pleading from Ms. Cindy Beckett seeking status as an Intervenor [or participant, pursuant to RCW 36.70A.330(2)] in the January 15, 2004 compliance proceeding. (**1/13/04 Pleading**). The Board faxed copies of Ms. Beckett's request to the parties indicating it would be the first matter discussed at the compliance proceeding. The Board also made arrangements for Ms. Beckett to call in for the compliance hearing.

On January 15, 2004, the Board telephonically conducted the Compliance Hearing. Edward G. McGuire, Presiding Officer, and Board Member Bruce C. Laing participated for the Board. Also participating telephonically was: Lloyd Fetterly representing Pierce County; Richard Hill, representing Petitioner MBA/Brink (Tiffany Spier shared a line with Mr. Hill; and Cindy Beckett, potential participant. Also present at the Board's offices was Board Extern, Lara Hiesler. The compliance hearing was recorded.

II. INTERVENTION/PARTICIPATION

Ms. Beckett's pleading indicates she is an interested person who has participated in the development of the Parkland Spanaway Midland Community Plan and implementing regulations and moves to intervene in the compliance proceedings. However, she opposes the action taken by the County to comply with the Act (per the Board's Orders), nor does she support the position advanced by MBA in the previous proceedings. Consequently, intervention is not appropriate in the compliance proceedings and status as

an intervener is **denied**. However, Ms. Beckett may be able to take part in the compliance proceeding as a participant, as allowed by the GMA.¹

RCW 36.70A.330(2) provides in relevant part:

A person with standing to challenge the legislation enacted in response to the board's final order may participate in the [compliance] hearing along with the petitioner and the . . . county.

As the first matter of business at the compliance hearing the presiding officer asked if Ms. Beckett had participated (orally or in writing) before the County during the adoption of Ordinance No. 2003-101 (the legislation enacted in response to the Board's FDO). Ms. Beckett indicated that she had participated. Neither the County nor MBA disputed Ms. Beckett's participation during the remand. The Board consequently concluded that, pursuant to RCW 36.70A.330(2), Ms. Beckett was entitled to participate in the compliance proceeding and status as a participant was **granted**.

However, both the County and MBA objected to the Board's consideration of the pleadings submitted by the participant on the grounds that the filing was 1) untimely; and 2) not responsive to the Board's FDO, in that it presented issues and concerns that were not before the Board in the original PFR.

Timeliness:

As a matter of course, when the Board finds that a jurisdiction has not complied with the goals or requirements of the Act, the Board establishes a compliance schedule in its Order. *See* FDO, at 33-35; or Order Finding Partial Noncompliance and Continuing Invalidity, at 13-14; both quoted *supra*. The compliance schedule includes a specified date for the jurisdiction to take appropriate legislative action; a date for the jurisdiction to submit a SATC, a deadline for commenting on the SATC, a deadline for replying to any comments, and the date of the compliance hearing.

The basis for the County and MBA's objection to Ms. Beckett's participation is that her pleading was received by the Board after the comment and reply deadline had past; and only two days prior to the compliance hearing. It is correct that in this matter, Ms. Beckett's request was received beyond all the deadlines established in the Board's Orders. However, the Board has never articulated a timeframe for requesting participation status in compliance proceedings, and will not penalize Ms. Beckett in this case. However, in subsequent Board Orders, the Board will indicate that the **deadline established for commenting on the SATC will also be the deadline for requesting participant status in a compliance hearing. Failure to make such request by the established comment deadline will result in participation status being denied.**

¹ The Board notes that any person with standing may file an appeal a legislative action of a jurisdiction, if such petition for review is filed within 60 days of publication. See RCW 36.70A.280 and .290.

Responsiveness:

The outstanding issue on remand is whether the new zoning designation for 127 acres in Area 1, within the Parkland Spanaway Midland Community Plan area, allows appropriate GMA urban densities. Participant's concerns focus on the County's enforcement of its present critical areas regulations and the procedures and data used by the County to identify and designate wetlands.² See 1/13/04 Pleading, at 1-3, and attachments. Consequently, Participant's issues are **non-responsive** and misplaced in the present compliance proceeding.

During the discussion at the compliance hearing, the County indicated it was presently reviewing, per a GMA requirement, its critical areas regulations and processes. The County encouraged and invited Ms. Beckett to begin or continue her participation in that process, as it was dealing with regulations with which Ms. Beckett has her primary concerns. The Board concurs, and also encourages Ms. Beckett to participate in the County's critical areas review.

III. DISCUSSION of REMAND ISSUE

In the Board's 9/4/03 Order, two areas within the Parkland Spanaway Midland Subarea Plan (**PSMCP**), totaling 127 acres were found noncompliant with, and not guided by, RCW 36.70A.020(1) and (2). The two areas within Area 1 (Midland /North Fork Origin) were designated with Residential Resource (**RR**) zoning designations and were not compliant with the urban density provisions of the Growth Management Act (**GMA**). In its 9/4/03 Order, the Board also invalidated these zoning designations.

In response to the Board's 9/4/03 Order, on November 4, 2003, the County adopted Ordinance No. 2003-101. Ordinance No. 2003-101 eliminates all areas of Residential Resource zoning that have been deemed invalid by the Board. See SATC2, at 4; Ordinance No. 2003-101, 'WHEREAS' clauses, at 5; Ordinance No. 203-101, Sections 1 and 2, at 5, and (Exhibits A and B); and Ordinance No. 2003-101, Section 3, Findings of Fact, at 5, and Exhibit C, at 4.

At the compliance hearing, the County contended that adoption of Ordinance No. 2003-101 complied with the goals and requirements of the GMA and complied with the direction provided by the Board in its FDO and 9/4/03 Order. Petitioners concurred with the County. The Board concurs.

² The Board acknowledges that information obtained in the critical areas identification and delineation process can provide a basis for subsequent future land use map designations and zoning designations. However, existing information and regulations control in the present proceeding.

IV. FINDINGS and CONCLUSIONS

1. The Board's 9/4/03 Order identified 127 acres in Area 1 (Midland/North Fork Origin) of the PSMCP, as being designated at inappropriate urban densities and therefore, noncompliant with the goals and requirements of the GMA.
2. The Board's 9/4/03 Order also determined that RR designation for these 127 acres substantially interfered with goals 1 and 2 of the Act, and therefore, the Board invalidated these designations.
3. Ordinance No. 2003-101 amends the PSMCP and zoning atlas to eliminate all areas of RR zoning that have been found to be noncompliant with the GMA and deemed invalid by the Board. *See* SATC2, at 4; Ordinance No. 2003-101, 'WHEREAS' clauses, at 5; Ordinance No. 2003-101, Sections 1 and 2, at 5, and (Exhibits A and B); and Ordinance No. 2003-101, Section 3, Findings of Fact, at 5, and Exhibit C, at 4.
4. Having eliminated the RR designation for the noncompliant 127 acres, the Board concludes that Ordinance No. 2003-101 complies with the goals and requirements of the GMA.

V. FINDING OF COMPLIANCE and RECISSION OF INVALIDITY

Based upon review of the Board's February 4, 2003 Final Decision and Order, the Board's September 4, 2003 Order Finding Partial Noncompliance and Continuing Invalidity, the County's SATC2, Ordinance No. 2003-101, the comments and arguments offered at the compliance hearing, Findings and Conclusions 1-4, *supra*, the Board finds:

- By adopting Ordinance No. 2003-101, Pierce County has **complied** with the goals and requirements of the GMA as set forth in the aforementioned Board Orders. The Board therefore enters a **Finding of Compliance** for Pierce County regarding the Parkland Spanaway Midland Community Plan and implementing regulations.
- Further, having achieved compliance with the goals and requirements of the Act, there is no longer a basis for invalidity, consequently the Board's **Determination of Invalidity**, as found in the FDO and 9/4/03 Orders are **rescinded**.

VI. ORDER

CPSGMHB Case No. 02-3-0010, *Master Builders Association of Pierce County, Terry Brink, Edward Zenker, Associated General Contractors and Tacoma Pierce County Chamber of Commerce – South County Division v. Pierce County*, is **closed**. The provisions of the Parkland Spanaway Midland Community Plan and implementing regulations challenged in this action have been determined to **comply** with the goals and requirements of the GMA.

So ORDERED this 21st day of January 2004.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Bruce C. Laing, FAICP
Board Member

Edward G. McGuire, AICP
Board Member

Joseph W. Tovar, AICP³
Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.

³ Board Member Tovar, although not present at the compliance hearing, read the submittals of the parties and participated in the Board's discussion and deliberations.